FILE COPY

Supreme Court, U. S.

Oct[illegible] Term, A. D. 1947.

No. 669

A. N. SPANEL,

Petitioner,

vs.

DR. BORIS BEEKMAN and DR. SOPHIA BEEKMAN,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF HIS PETITION FOR CERTIORARI.

Max Swerdlow,
Herbert H. Hirsch,
Attorneys for Plaintiff-Appellant, Petitioner.

Swerdlow & Heffernan,
Suite 1400
135 South LaSalle Street,
Chicago 2, Illinois,
Of Counsel.

The Schaffer Printing Company, Financial 6-3694

TABLE OF CONTENTS

PAGE

The Facts 1

I. The Decision Below is Clearly in Conflict with the Decisions of This Court and of the Court of Appeals for the First Circuit 3

A. Conflict with *Erwin* v. *Lowry*, 7 How. 172 (1849) 3

B. Conflict with *United States* v. *Dashiel*, 3 Wall. 688 (1866) 3

C. Conflict with *Jones* v. *Pettingill*, 245 Fed. 269 (C. A. 1st 1917) cert. den. 245 U. S. 663 (1917) 4

D. The cases on which the respondents rely 4

II. Conflict with Rule 62(d), Rules of Civil Procedure, and 28 U.S.C. §1961 5

III. There is No Question of State Law Before This Court 6

Conclusion 7

Authorities Cited.

Cases:

Crawshay v. Soutter, 6 Wall. 739 (1868) 4

Deitrick v. Greany, 309 U. S. 190 (1940) 6

Embry v. Palmer, 107 U. S. 3 (1882) 3, 4, 5

Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938) .. 6

Erwin v. Lowry, 7 How. 172 (1849) 3, 6

Ettelson v. Metropolitan Life Ins. Co., 317 U. S. 188 (1942) 6

Gilfillan v. McKee, 159 U. S. 303 (1895) 5

Guaranty Trust Co. v. York, 326 U. S. 99 (1945) 6

Jones v. Pettingill, 245 Fed. 269 (C. A. 1st 1917) cert. den. 245 U. S. 663 (1917) 4

PAGE

Prudence Corporation v. Geist, 316 U. S. 89 (1942) .. 6
United States v. Benedict, 261 U. S. 294 (1923) 4
United States v. Dashiel, 3 Wall. 688 (1866) 3, 5
Woodworth v. Chesbrough, 244 U. S. 79 (1917) 4

Statutes and Rules:

Federal Rules of Civil Procedure, Rule 62(d) 5
United States Code, Title 28, §1291 6
§1961 5

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

A. N. SPANEL,

Petitioner,

vs.

DR. BORIS BERKMAN and DR. SOPHIA BERKMAN,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF HIS PETITION FOR CERTIORARI.

May It Please the Court:

The Facts.

The appeal was dismissed by the Court of Appeals upon the ground that the acceptance of $973.98, the unexpended balance of the research fund ordered returned to Spanel by the District Court, constituted a waiver of the right of appeal (R. 442, 445-9). The motion to dismiss was predicated upon the same single ground (R. 423-4, 431-2). Respondents now seek to bolster their position by the suggestion, for the first time, that Spanel took possession of the pilot plant "consistently" with the judgment of the District Court. They imply that the satisfaction filed related to something more substantial than the portion of the judgment awarding Spanel $973.98 and included the award of the pilot plant that cost almost $10,000 (Res. Br. 3). That is simply not true. The only record support offered refers to the "partial satisfaction of judgment," which deals only with the small cash payment (R. 403).

Actually the pilot plant, essential to the continuation of the contract, had been abandoned by the Berkmans, who declined to pay rent for its preservation even out of the $973.98 remaining in their hands. Spanel stepped in, paid the rent and preserved the plant months before the District Court trial and judgment (R. 145, 242, 383).

The motion for dismissal not being grounded upon the disposition of the pilot plant, the Court of Appeals was neither called upon to, nor did it, examine the facts with respect thereto. Its judgment rested entirely upon Spanel's action in "accepting and satisfying this *part* of the judgment" with respect to the $973.98 (R. 445, emphasis supplied).

Respondents also ignore the fact that the Berkmans were specifically prohibited by the contract from retaining this money except for the purpose of research and that they had under oath disavowed its usefulness for that purpose (R. 118-9, 257). Accordingly, the money was Spanel's on any theory.[1]

The award of the small unexpended cash balance to Spanel was therefore not dependent upon the termination of the contract and the District Court did not assign that ground for its judgment (R. 402).

---

[1] Moreover, Spanel expended far more than $973.98 to preserve the pilot plant. Dr. Berkman stopped paying the $300 monthly rent on the pilot plant premises in April, 1947 (R. 242, 383). Spanel then assumed that burden and was still paying the rent five months later at the time of the trial (R. 145). The award of the $973.98 to Spanel was, thus, consistent with the continued force of the contract, either as a refund of sums inadequate for research, or as reimbursement of rent advanced to preserve the pilot plant and the project.

I.

The Decision Below is Clearly in Conflict with the Decisions of This Court, and of the Court of Appeals for the First Circuit.

A. Conflict with Erwin v. Lowry, 7 How. 172 (1849).

To avoid the square conflict between the decision below and this Court's decision in *Erwin* v. *Lowry,* 7 How. 172, 183-4 (1849), respondents make the erroneous assertion that the *Erwin* case held only that "a defendant does not waive his right to appeal by paying a judgment entered against him" (Res. Br. 10). What this Court there decided was that voluntary acceptance by the appellant of funds, deposited with a court officer pursuant to an adverse judgment, would not bar his appeal. The decision holds not that a party may *pay* a judgment and appeal, but rather that a party may *accept* benefits under a judgment and still appeal. That ruling, as demonstrated in petitioner's principal brief, conflicts directly with the decision of the court below in this case.

B. Conflict with United States v. Dashiel, 3 Wall. 688 (1866).

Respondents concede that in *United States* v. *Dashiel,* 3 Wall. 688 (1866), a partial satisfaction of appellant's judgment was held no bar to his appeal (Res. Br. 11). But it was upon Spanel's receipt of "partial satisfaction of judgment" that both the respondents and the court below relied (R. 423-4, 431-2, 445). Respondents would avoid the conflict between the Court of Appeals decision and the *Dashiel* case by drawing from the latter case a "clear intimation, *obiter*" that payment of a judgment in full would bar an appeal (Res. Br. 11). Apart from the holding of this Court to the contrary,[2] the judgment here was clearly satisfied in part only.

---

[2] Erwin v. Lowry, 7 How. 172 (1849). See also Embry v. Palmer, 107 U. S. 3 (1882), discussed infra pp. 4-5.

C. Conflict with Jones v. Pettingill, 245 Fed. 269 (C. A. 1st 1917) cert. den. 245 U. S. 663 (1917).

The Court of Appeals for the First Circuit held in *Jones* v. *Pettingill,* 245 Fed. 269, 276-7 (C. A. 1st 1917) cert. den. 245 U. S. 663 (1917), that acceptance of benefits under a decree and execution of a satisfaction did not operate to waive the right of appeal. The decision rested not upon any claimed mistake as respondents indicate, but upon the absence of an intent to waive appeal. In the *Jones* case full satisfaction was acknowledged three days after the judgment. A motion to reconsider was filed a month later and the appeal prosecuted more than two months later. No tender of the funds the appellant had received was ever made. In the instant case the small cash payment was made voluntarily by the Berkmans and Spanel's notice of appeal was filed only seven days later (R. 403-4). When the contention was made that a waiver had occurred, Spanel promptly resisted and tendered back what he had received (R. 425-6). The decision of the Court of Appeals for the First Circuit and the decision of the Court of Appeals for the Seventh Circuit in the instant case are irreconcilable.

D. The cases on which the respondents rely.

Respondents cite at page 9 of their brief *United States* v. *Benedict,* 261 U. S. 294, 298 (1923), *Woodworth* v. *Chesbrough,* 244 U. S. 79, 82 (1917) and *Crawshay* v. *Soutter,* 6 Wall. 739 (1868). Each of these cases involved a consent to the questioned judgment before its entry. This Court noted in *United States* v. *Benedict* that the final judgment there considered must be treated "as though entered upon its [petitioner's] express consent" (261 U. S. 294, 298).

Embry v. *Palmer,* 107 U. S. 3 (1882), also relied upon at page 9 of respondents' brief, held that an appellant did not waive his right to appeal from portions of a

judgment adverse to him by accepting full payment of amounts awarded him in the judgment appealed from.[3] It is said by the respondents that this case recognizes a general rule that acceptance of benefits precludes an appeal from a judgment, but applies an exception, permitting appeal where the amount received is not in controversy. *Embry* v. *Palmer,* however, specifically avoids "the general question" of what action results in a waiver of the right to appeal. 107 U. S. 3, 8. Further, although the appellant in the *Embry* case had received payment *in full* of all that had been awarded to him by the judgment appealed from, the Court treated *United States* v. *Dashiel,* 3 Wall. 688 (1866) as dispositive of the issues presented. The *Dashiel* case had permitted an appeal in the face of an acceptance of benefits, without reference to the question of whether the benefits accepted were or were not in controversy; indeed, the benefits accepted by the appellant in the earlier case apparently were in controversy. 3 Wall. 688, 689.

II.

Conflict with Rule 62(d), Rules of Civil Procedure, and 28 U.S.C. §1961.

In response to the argument that the holding of the Court of Appeals is practically inconsistent with the rule and statute above cited, the Berkmans say only that they paid the portions of the judgment adverse to them without supersedeas and before any obligation for interest arose. Respondents do not comment upon or discuss the election forced upon litigants by the Court of Appeals either to yield rights under the appeals statute or rights under the rule and statute above cited — a choice contrary to their terms and spirit.

---

[3] Gilfillan v. McKee, 159 U. S. 303, 312 (1895), also relied upon by the respondents (Res. Br. 9), simply follows Embry v. Palmer.

III.

There is No Question of State Law Before This Court.

The sole issue before this Court is Spanel's right to maintain an appeal under a federal statute from a judgment entered by a federal court. Respondents' reliance on *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 (1938), and *Guaranty Trust Company* v. *York,* 326 U. S. 99 (1945), is totally misplaced. The United States Code, Title 28, §1291, confers upon Spanel the right to appeal. Whether he lost that statutory right presents no question of state law. The only questions presented relate to federal appellate practice and the interpretation of a federal statute. The teaching of *Erwin* v. *Lowry,* 7 How. 172 (1849) is that the acceptance of benefits is not a waiver of the statutory right to appeal in the federal courts.

This Court has squarely held that state law may not be taken into account in determining the right to appeal to a United States Court of Appeals. *Ettelson* v. *Metropolitan Life Insurance Company,* 317 U. S. 188, 191 (1942). The effects of an acceptance of benefits under an adverse judgment "though left by the statute to judicial determination are nevertheless to be derived from it and the federal policy which it has dictated."[4] The fact that the substantive rights under the Spanel-Berkman contract were to be determined by Illinois law provides no basis for the claim that the appellate procedure of that state—or of the other states whose decisions are cited—can restrict Spanel's right to appeal under the federal statute.

---

[4] Deitrick v. Greany, 309 U. S. 190, 200-201 (1940). This case concerned the consequences of the violation of a federal statute. See also Prudence Corporation v. Geist, 316 U. S. 89, 95 (1942).

Conclusion.

For the reasons set forth in the petition for writ of certiorari, as well as those set forth above, a writ of certiorari should issue to the United States Court of Appeals for the Seventh Circuit in this cause.

Respectfully submitted,

MAX SWIREN,
HUBERT H. NEXON,
Attorneys for Petitioner.

SWIREN & HEINEMAN,
Suite 1406,
135 South LaSalle St.,
Chicago 3, Illinois,
Of Counsel.